Aug 23, 2001

Supreme Court, U.S.
AUG

No. 00-1519

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RALPH ARVIZU,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties that threaten the reservation of power to the citizenry that underlies our constitutional system. The DKT Liberty Project is also particularly involved in defending the right to freedom from government restraint and interference, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual.

This case implicates the fundamental right of each citizen to be free from government restraint and interference. It also implicates the effects on the citizenry of regular unwarranted governmental intrusion. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Because of The DKT Liberty Project's strong interest in protecting citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The objectively reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968) requires law enforcement officers to have specific and articulable facts to justify a decision to detain – and therefore seize – any person. That requirement, which should roughly predict illegal conduct, and therefore arrest, is critical because it protects the rights of law-abiding citizens to be free from such seizures. Recent data shows, however, that enormous numbers of innocent people are regularly detained by law enforcement. The percentage of *Terry* stops that result in arrests is extremely low, rarely more than five percent, and often substantially less. This data suggests that the *Terry* standard – which is already lower than the probable cause requirement of the Fourth Amendment – must be jealously guarded, and that law enforcement need clearer guidelines as to what constitutes reasonable suspicion.

The stop at issue in this case was not justified, because the specific facts articulated by the agent do not support an objectively reasonable suspicion that illegal conduct was afoot. None of the factors standing alone would justify the stop. And combining them does not, as it did in *Terry*, create any more indicia of illegality than the factors did separately. Thus, this Court should affirm the ruling below that the stop was illegal. In doing so, this Court can give sorely needed guidance to law enforcement agencies as to the limits and proper use of the flexible *Terry* standard.

ARGUMENT

I. AVAILABLE DATA SHOWS THAT, IN PRACTICE, THE BALANCE STRUCK IN *TERRY* NOW TILTS STEEPLY AGAINST INNOCENT CITIZENS.

A. *Terry* Required That Investigative Stops Be As Narrowly Targeted As Possible To Avoid Seizing Innocent Persons.

In *Terry*, this Court held that all investigative stops by law enforcement, no matter how brief, are governed by the Fourth Amendment. The *Terry* standard was not drawn up to shelter the guilty, but rather to protect the rights of the innocent, since the Court recognized that the seizure of any person, even momentarily, was a "substantial interference with liberty and personal security." *Terry*, 392 U.S. at 12. More importantly, the *Terry* Court recognized that if left unchecked by the courts, the regular seizures of innocent persons – even in the good faith attempt to find wrongdoers – posed a threat to society at large. These practices, the Court noted, "inflict great indignity and arouse strong resentment," *id.* at 17, and could even "exacerbate police-community tensions in . . . our Nation's cities." *Id.* at 12.

Compelled by these twin concerns, the *Terry* Court set forth an objective test to govern investigate stops by the police. To ensure that police did not stop everyone routinely, or anyone randomly, *Terry* required law enforcement officers to have a reasonable suspicion based on "specific and articulable facts" that the target of their seizure was involved in criminal activity. *Id.* at 21. *Terry* emphasized that investigative stops could not be justified by "inarticulate hunches" nor mere "good faith on the part of the . . . officer." *Id.* at 22 (internal quotation and

citation omitted). To the contrary, *Terry* held that the investigative stops would be "judged against an objective standard: would the facts available to the officer at the moment of the seizure . . . warrant a man of reasonable caution in the belief that the action taken was warranted?" *Id.* at 21-22 (internal citation omitted).[2]

Since *Terry*, the Court has continued to insist that investigative stops ensnare as few innocent persons as possible. Although the Court has acknowledged that *Terry* stops are not about "hard certainties, but . . . probabilities," *United States v. Cortez*, 449 U.S. 411, 418 (1981), the Court has nevertheless monitored these probabilities closely – and it has set the standard high. For example, in *Reid v. Georgia*, 448 U.S. 438 (1980), the Court rejected a *Terry* search grounded in part on the petitioner's early morning arrival from Fort Lauderdale without luggage because those circumstances "describe a very large category of presumably innocent travelers, who would be subjected to virtually random seizures" if the search in question were upheld. 448 U.S. at 441. And in *Florida v. J.L.*, 529 U.S. 266 (2000), decided just last year, the Court held that an anonymous tip did not justify a *Terry* stop where it contained only the description of a suspect and his location at a bus stop, because, in part, such a rule could cause stops of many innocent people without a reasonable suspicion of illegality. The Court held that the "reasonable suspicion here at issue requires that a tip be reliable in its *assertion of illegality*, not just in its tendency to identify a determinate person." 529 U.S. at 272

[2]It bears repeating that the brief and limited duration and nature of such stops, and the exigencies of the situation that require them, led the Court to apply a lower standard than the probable cause required in the Fourth Amendment. Thus, the *Terry* stop is already in the nature of an exception to the Fourth Amendment, so it should be narrowly construed.

(emphasis added).

More pointedly, this Court has refused to countenance investigative seizures based on factors shared by a large group of people, even when those factors are also shared by a subset of people engaged in criminal conduct. Thus in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Border Patrol argued that it was allowed to stop cars based solely on the occupants' appearance of Mexican ancestry. But despite the fact that the vast majority of illegal aliens at that border were of Mexican ancestry so that Mexican appearance was a relevant factor, the Court held that Border Patrol "roving patrols" could not stop cars based on that fact alone. *Id.* at 886. The Court so held because "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proporation of them are aliens." *Id.* at 886-87 & n.11. Concluding that the rule proposed by the Border Patrol would "subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of [the] Border Patrol," *id.* at 882, the Court held that even where aliens made up as much as 20.4 percent of the population at the time, that figure was not high enough to justify a *Terry* stop on the basis of Mexican ancestry alone.

In short, this Court has consistently required *Terry* stops to be justified by articulable facts that distinguish a particular suspect from a larger pool of innocent persons who share common factors.

B. Contrary To The Fourth Amendment, A High Percentage Of Innocent Persons Are Ensnared In Investigative Stops By Law Enforcement.

One measure of whether *Terry* stops generally are achieving their goal is the percentage of those stops that actually result in arrest, since, writ large, "reasonable suspicion" is intended to predict illegality. Thus, the percentage of arrests from stops based on reasonable suspicion should be higher than the percentage of arrests from random stops. Moreover, if a large percentage of persons stopped are not engaged in criminal activity justifying an arrest, that fact suggests some problem with the reasonable suspicion criteria in use.

Though empirical evidence on how often *Terry* stops result in arrests is rare, some data is quite recently available. This evidence has come from several sources. On the federal level, spurred by public interest in the "racial profiling" issue, government agencies have begun to assemble data relating to law enforcement contact with citizens, including information about the background of the person detained and the outcome of each incident.[3] On the state and local levels, approximately 400 police agencies nationwide have begun to collect similar data, and many have started to make this data available to the public. Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, Wash. Post, June 28, 2001, at A1.

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[3]*See* William J. Clinton, *Memorandum on Fairness in Law Enforcement*, 35 Weekly Compilation of Presidential Documents 1067 (June 9, 1999), *available at* http://www.oele.org/fedprof.html (visited Aug. 20, 2001); Dep't of Justice, *Dep't of Justice Proposal Responding to the Executive Memorandum on Fairness in Law Enforcement* (Oct. 8, 1999) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/remflep.pdf (visited Aug. 20, 2001). The results of this initiative have not yet been released.

Finally, several litigants in civil and criminal actions have obtained valuable and often highly relevant data through discovery.

Though a good deal of data has yet to be published, the available evidence shows troubling trends in law enforcement. In some areas, only two to five percent of *Terry* stops result in an arrest. In other cases, the data reflects an outright disregard for the principles of *Terry*, as suspected lawbreakers are seized and questioned without any pretense of specific or articulable facts. Moreover, mounting evidence suggests that the percentage of *Terry* stops resulting in arrest varies dramatically among racial lines, suggesting that law enforcement officers apply the *Terry* standard differently according to the race of the suspect.

1. Border Patrol

In addition to patrolling the Nation's borders, the Border Patrol has statutory authority to seize and take into custody any illegal aliens found up to 100 miles inland. 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(2). Border Patrol seizures conducted within the nation's interior are governed by the Fourth Amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

The Border Patrol has not released statistics on the number of *Terry* stops made by its officers. *Nicacio v. INS*, 595 F. Supp. 19, 23 (E.D. Wash. 1984), *aff'd*, 797 F.2d 700 (9th Cir. 1985), *overruled on other grounds, Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *Murillo v. Musegades*, 809 F. Supp. 487, 495 (W.D. Tex. 1992). In fact, partly to remedy that problem, legislation is now pending in Congress that would *require* the federal government to collect data on

traffic stops within 25 miles of the border. *The Traffic Stops Along the Border Statistics Study Act of 2001*, H.R. 1778, 107th Cong. (2001). Until such information is public, however, it is not possible to gauge with certainty how often Border Patrol stops result in arrests. It is true that some Border Patrol officials have estimated in courts that over 90 percent of their automobile stops result in the arrest of illegal aliens. *See, e.g., Nicacio,* 595 F. Supp. at 23. However, the Border Patrol has yet to offer any objective documentation of this claim and the available data suggests that the actual percentage is far lower.[4]

The only actual analysis of Border Patrol automobile stops was compiled by the plaintiffs in a class-action lawsuit brought recently in Tucson, Arizona, on behalf of all Hispanics who drive on the highways of Southern Arizona. *Hodgers-Durgin v. De La Vina*, No. Civ. 95-029 TUC-JMR (D. Ariz.). Through discovery, the plaintiffs obtained the Border Patrol radio logs for the Tucson sector for the period June 1994 through December 1995.[5] The plaintiffs' analysis of these radio logs, using the codes provided to them by the Border Patrol, revealed that out of a total of 534 vehicle stops made by roving patrols, only 14 resulted in arrests – less than three percent of the total. *Pl. Mot. to Reconsider Class Certification* 45 (D. Ariz. filed

[4]Moreover, even when the Border Patrol has presented statistics on vehicle stops, some courts have not deemed it reliable. *See, e.g., Murillo*, 809 F. Supp. at 495 ("The record produced by the El Paso Border Patrol and the testimony given by [the local Border Patrol sector chief] contains at least questionable, possibly inflated, and apparently inconsistent statistics.").

[5]Interestingly, the Tucson sector includes the location of the stop challenged in this case.

Oct. 1996) (attached at Appendix A).[6]

An explanation for this extremely low correlation between investigative stops and arrests can be found in the cavalier attitude of many Border Patrol agents and supervisors, as chronicled in numerous court opinions. For example, in *Mendoza v. INS*, 559 F. Supp. 842 (W.D. Tex. 1982), the Court found that Immigration & Naturalization Service agents participated in a "dragnet" series of bar raids in the El Paso area in search of illegal aliens. The raids involved bursting into the bars (known to be frequented by people of Mexican descent), stopping the music, barring and guarding the doors, stopping bar service, lining up the patrons, randomly interviewing patrons (concentrating on those of Mexican descent), and searching private areas of the bar *Id.* at 845. The court declared it was "offensive to the Court's sense of justice that any one of us could have been caught in one of the indiscriminately thrown dragnets in El Paso on January 29 while enjoying mariachi music and tostados." *Id.* at 848. Accordingly, the Court enjoined INS (which included the Border Patrol) from stopping persons without more than a suspicion based on their Hispanic appearance. But ten years later, the same judge on the same court recounted a long and sordid history of further Border Patrol conduct and concluded (again) that Hispanic residents in El Paso had been "based on their Hispanic appearance, repeatedly stopped, questioned, detained, frisked, searched, and arrested without cause and have been subjected to verbal and physical abuse." *Murillo,* 809 F. Supp. at 498. Most surprising was the statement of the Section Chief of the El Paso Border Patrol that although he had "heard"

[6]Because the lawsuit was eventually dismissed on standing grounds, the Court never addressed the merits of the case. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

of the *Mendoza* injunction issued against his agency, he had neither read the injunction or the opinion, nor done anything to implement them or monitor compliance. *Id.* at 495.

The Texas agents are not alone. In *Nicacio,* the district court held that the Border Patrol in Washington so regularly stopped vehicles and questioned the occupants without the required articulable facts to form a reasonable suspicion as to constitute a *practice*. *Nicacio*, 595 F. Supp. at 23. The court ordered a halt to this practice and directed the Border Patrol to document in writing all investigative stops and to maintain that documentation for at least three years. *Id.* at 26. The federal circuit court of appeals affirmed those findings and rulings. *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985), *overruled in part on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999). More recently, the Attorney General of Arizona issued a report which documented INS and Border Patrol participation in a five-day dragnet for illegal aliens in Chandler, Arizona. Office of the Attorney General of Arizona, *Results of the Chandler Survey* (1997). The report concluded that the Border Patrol made "numerous" stops of citizens and legal residents without reasonable suspicion. *Id.* at 31-32.

2. Drug Enforcement Agency

The Drug Enforcement Agency runs drug interdiction efforts at many of the nation's airports, relying largely on a "drug courier profile" developed in the 1970's by DEA agent Paul Markonni of Detroit. *See generally* Charles L. Becton, *The Drug Courier Profile: 'All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye,'* 65 N.C. L. Rev. 417, 419 (1987). The DEA does not keep comprehensive statistics on the effectiveness of the drug courier profile program. *Id.* at 418 n.4. In some cases the DEA

has presented data on the number of arrests made, or the percentage of searches that yielded arrests, but, like the Border Patrol, the DEA has not made available documentation of the number of people temporarily detained but not subsequently searched or arrested. *Id.*; *see also United States v. Place*, 660 F.2d 44, 48-49 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983); *United States v. Vasquez*, 612 F.2d 1338, 1352 & n.8 (2d Cir. 1979) (Oakes, J. dissenting).

Nonetheless, cases reported to date strongly suggest that, like the Border Patrol, the number of arrests resulting from DEA *Terry* stops is extremely low. For example, in *United States v. Hooper*, 935 F.2d 484 (2d Cir. 1991), DEA agents testified that out of the 600 people they detained at the Greater Buffalo International Airport, they arrested only ten, for an arrest rate of 1.6 percent. *Id.* at 500 (Pratt, J., dissenting). Similarly, in *United States v. Moya*, 561 F. Supp. 1 (N.D. Ill. 1981), *aff'd*, 704 F.2d 337 (7th Cir. 1983), *vacated on other grounds*, 464 U.S. 979 (1983), another DEA agent testified that he routinely detained two to three people per day at Chicago's O'Hare Airport on the basis of his suspicions, but that these stops had led to only 70 to 80 arrests in three years. 561 F. Supp. at 4. Thus, in only three to five percent of these investigative seizures did the "reasonable suspicion" predict criminal conduct. *But see* Zedlewski, *The DEA Airport Surveillance Program: An Analysis of Agent Activities* (1984) (a National Institute of Justice study in which DEA agents reported over eight weeks that 33 percent of stops resulted in arrests), *cited in* John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* 226-27 (1985).

3. State And Local Law Enforcement

Of the numerous jurisdictions presently compiling data on police stops, many focus on the arrest rates for nonconsensual searches or routine traffic stops, as opposed to *Terry* stops ostensibly founded on reasonable suspicion. Nonetheless, data that has emerged to date sheds considerable light on law enforcement's current practices under *Terry*.

The most important study to date is a recent effort by the Attorney General of New York to document and evaluate "stop and frisk" activities in New York City. *See* Office of the Attorney General of New York, *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), *available at* http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf (visited Aug. 20, 2001) (*NYC Stop & Frisk Report*). That report shows that only 11 percent of New York City's stops and frisks between January 1998 and March 1999 resulted in an arrest. *Id.* at 111-12. Even more disturbing, the Attorney General's evaluation of the forms that police are required to fill out after each *Terry* stop revealed that a full 23.5 percent failed to contain sufficient information to determine whether reasonable suspicion had been met, while another 15.4 percent stated facts that, on their face, were not adequate to constitute reasonable suspicion. *Id.* at 160-63.

In another study reported by the American Civil Liberties Union, the author examined 34,000 highway stops by the California Highway Patrol in 1997 and found that only two percent resulted in arrests. David Harris, *Driving While Black: Racial Profiling On Our Nation's Highways* (ACLU Special Report, June 1999), *available at* http://www.aclu.org/profiling/report (visited Aug. 20, 2001).

C. The Effects Of Unwarranted Stops Are Lasting And Dangerous.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). Because of this truth, the frequent unjustified seizures of innocent persons are not merely an inconvenience to the person seized – they endanger the rule of law. The *Terry* Court recognized the "serious intrusion" of such seizures "which may inflict great indignity and arouse strong resentment." *Terry*, 392 U.S. at 17. And it specifically looked to the community's reaction to such seizures to gauge their reasonableness: "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." *Id.* at 17 & n.14.

One need not look far to see evidence of that community resentment today. Fear, anger and hopelessness – and in many cases, all three – are the predominant reactions among those who have been the victims of arbitrary and suspicionless *Terry* stops. In the case of suspected illegal aliens, especially children, fear is the predominant reaction. The Arizona Attorney General documented these effects in his 1997 report about Border Patrol abuses. *See Results of the Chandler Survey, supra,* at 3 (testimony of Catalina Veloz, a United States citizen, describing how her five year old son now cries when he sees police officers on the street); *id.* at 19 (testimony of "Q", whose daughters were wrongfully harassed by Border Patrol agents, describing how her daughters now hide when there is a knock on the door because "maybe it is the police"). *See also Murillo*, 809 F. Supp. at 493 (finding that plaintiffs "have been insulted, humiliated, degraded and embarrassed" by

their unlawful seizures by the Border Patrol and they are "afraid they will be stopped, questioned, detained, frisked, arrested, searched, and physically and verbally abused by Defendants in the future without legal cause").

For other victims of police misconduct, distrust and anger are the more logical result. *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 273-74 (1999) (interview with Kevin, an executive in his thirties, who says "When I see cops today, I don't feel like I'm protected . . . I do not feel safe around cops"); *id.* at 272 (interview with James, also an executive: "I'm not trying to bother nobody. But yet I got a cop pull me over says I'm weaving in the road. And I just came from a friend's house, no alcohol, no nothing. It just makes you wonder – was it just because I'm black?"). *See also NYC Stop & Frisk Report, supra*, at 79 (narrative of Ms. Davis, 54-year-old African American detained and patted down without apparent grounds by New York City police: "I was shocked and humiliated at being treated like a common criminal . . . I don't trust police officers.").

Society is surely burdened when citizens view law enforcement with the fear and distrust like that expressed by the victims above. But these emotions, as strong as they are, may not reveal the full story. The greatest harm is not anger and mistrust, but another sentiment commonly felt by victims of police abuse: the sense of futility. As the *Murillo* court put it about the repeatedly groundless Border Patrol detentions, "victims begrudgingly accept this type of abusive law enforcement action as a way of life." 809 F. Supp. at 496. In a police state, this attitude may be predictable, and even useful as it serves to shore up police power. But few beliefs, if widely held, could be so harmful to a free society which depends for

its order and restraint upon its citizens' respect for the rule of law.

II. APPROVING THE STOP IN THIS CASE WOULD LOWER THE *TERRY* STANDARD.

A. Absent Some Indicia Of Illegality, This Court Has Never Approved A *Terry* Stop On The Basis Of Wholly Suspicionless Individual Factors.

This Court has repeatedly held that the reasonable suspicion inquiry must take into account "the totality of the circumstances." *E.g. Cortez*, 449 U.S. at 417-18; *United States v. Sokolow*, 490 U.S. 1, 8 (1989). Taken at face value, this proposition is unremarkable: after all, factors which may appear irrelevant in one context may be of considerable relevance in another setting. Wearing a ski mask may not be suspicious conduct at a winter lodge in Aspen, but it takes on a somewhat different connotation at a bank branch in Miami.

But the "totality of the circumstances" test has never been a license to aggregate unrelated factors with little or no probative value into reasonable suspicion. *See, e.g., Reid*, 448 U.S. at 441 (facts that petitioner arrived from Fort Lauderdale, arrived early in the morning, carried no luggage, and appeared to be trying to conceal fact of travel with a companion were not sufficient to amount to reasonable suspicion). To the contrary, the Court insists on both "quantity *and* quality." *Alabama v. White*, 496 U.S. 325, 330 (1990) (emphasis added). The Court has recognized that even factors which, on their own, appear to have little or no bearing on the likelihood that criminal conduct

is afoot, might help in forming a reasonable suspicion.[7] But it has taken these "suspicionless" factors into the mix only in circumstances where something other than mere quantity of such factors creates the suspicion.

These cases have tended to present themselves in three different variants. One class of cases in which the Court has weighed suspicionless factors are those in which a *Terry* stop is ultimately justified on the basis of other, more probative considerations. *Sokolow* is a good example. There, DEA agents based their suspicions of Sokolow in part on the facts that he was traveling to Miami and that he did not check his baggage, two suspicionless factors that are reputedly characteristics of drug couriers. However, the DEA was initially drawn to Sokolow not merely by these factors, but because he had purchased a $2,100 ticket with $20 bills and he was traveling under an alias – behavior that the Court had no difficulty in terming "out of the ordinary." *Solokow*, 490 U.S. at 8. The fact that Sokolow was traveling to Miami and checked no bags was not irrelevant – had he checked his luggage to Des Moines, the agents may well have ignored him – but they became germane to the reasonable suspicion analysis only in the presence of two additional, significantly more probative factors. *See also Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) (similar facts).

A similar analysis applies to several other *Terry* stops approved by the Court. For example, in *Florida v. Rodriguez*,

[7]These factors might also be referred to as "innocent" factors, in the sense that they denote conduct that innocent people are equally likely to engage in. However, the Court has rightly made clear that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10 (internal citation omitted).

469 U.S. 1 (1989), the Court mentioned the respondent's apparently unorthodox bodily movements, but reasonable suspicion plainly flowed from the fact that these bodily movements took place while the Respondent was attempting to flee from an officer. *See also Illinois v. Wardlow*, 528 U.S. 119, 125-26 (2000) (Respondent's presence in area of heavy drug trafficking was of interest, but fact which truly aroused suspicion was his unprovoked flight from police).

In a second class of cases involving suspicionless factors, *Terry* stops have sometimes been justified on the basis of additional, extrinsic evidence from sources other than the subject's conduct. For example, in *Ornelas v. United States*, 517 U.S. 690 (1996), the relatively unremarkable facts that the Petitioner drove an old two-door General Motors car with California plates and checked into a Detroit motel at 4 a.m. were secondary to what effectively distinguished him from other ordinary travelers driving old cars and checking into motels late: his identification in a federal database of known and suspected drug dealers. *Id.* at 691-92. Similarly, in cases involving informants, police have extrinsic evidence to justify the stop. In *Adams v. Williams*, 407 U.S. 143 (1972) and *White*, for example, neither suspect exhibited conduct that would, on its own, lead any reasonable observer to suspect that criminal activity was afoot. But where law enforcement observation was supplemented by the contributions of reliable informants or the observed conduct was consistent with the informant information, the stops were justified. 407 U.S. at 146-47; *White*, 496 U.S. at 329-30. *See also Cortez*, 449 U.S. at 418-21 (stop of pickup truck justified where officers had earlier predicted, based on careful investigation of desert footprints and other clues, that vehicle of precisely that type would likely be transporting illegal aliens at precisely that location and precisely that time).

The third class of suspicionless factor cases is represented by the *Terry* decision itself. In that case, a police officer watched two men on a street corner proceed alternately back and forth along an identical route. Each paused to stare into the same shop window, and then returned to the corner to confer with the other. The men repeated this cycle a dozen time each (for a total of 24 trips to the store window) over a period of 10 to 12 minutes, and then conferred briefly with a third man. Although each act of strolling past a store window and looking in may have been innocent on its own, the 24 repetitions of that act take it out of the category of activities routinely engaged in by many innocent people. Thus, the peculiar *repetition* of what would otherwise be suspicionless conduct provided the basis for reasonable suspicion. *Terry*, 392 U.S. at 22-23. The Court had no trouble finding that the suspects' apparent stakeout of this store constituted "unusual" conduct warranting further investigation by law enforcement. *Id.* at 30.

Thus, this Court has not held that the simple aggregation of several suspicionless factors creates the reasonable suspicion necessary to justify a stop. Without some indicia that the suspicionless factors indicate any illegality, the list of factors is no more than a hunch.

B. In Contrast To Other *Terry* Stops Approved By The Court, The Suspicionless Factors In This Case Are Unaccompanied By Any Indicia Of Illegality.

1. No Significant Degree Of Suspicion Attaches To Any Of The Individual Factors Identified By The District Court.

Contrary to the vast majority of cases in which *Terry* stops have been sustained, this case contains no individual factors

which, when viewed in isolation, could in any way be considered "unusual," *Terry*, 392 U.S. at 30, or "out of the ordinary." *Sokolow*, 490 U.S. at 8. A brief review of the factors relied on by the District Court illustrates that this is so.

a) The use of the road in question. The District Court found that the dirt road on which Respondent traveled is one that could be used by illegal aliens or drug smugglers seeking to avoid a nearby Border Patrol checkpoint. Importantly, however, the District Court did not find that the road had no (or even few) other uses. To the contrary, there were many other uses by both residents of the area and vistors to the several recreation areas. Indeed, as the Circuit Court rightly observed, the roughly 50 or so arrests made by agent Stoddard during his two years with the Border Patrol constituted a mere one percent of the total vehicle traffic on that road. Pet. App. 5a n.5. Moreover, Agent Stoddard offered no testimony on the number of stops he made on that road which did *not* result in an arrest. Tr. 18-76 (J.A. 18-76).

b) The fact that Respondent traveled within one hour of the three p.m. Border Patrol shift change. Though this factor could be consistent with illicit activity, it is equally consistent with the activities of a resident or visitor going about their business in the middle of the day. Indeed, many innocent people were doing exactly that on the day in question. There is simply nothing peculiar about driving between the hours of 2 pm and 4 pm that suggests that the driver is engaged in criminal conduct.

c) The fact that another minivan was found to be carrying drugs in the same area a month earlier. This has absolutely no relevance to the reasonableness of *Agent Stoddard's* suspicions, as he candidly admitted at the suppression hearing that he

suspected the vehicle might be carrying illegal aliens, not drugs. Tr. 68 (J.A. 68). Moreover, one previous event cannot suggest a pattern that would objectively support a reasonable suspicion.

d) The fact that minivans are commonly used by smugglers. Again, while this may be true of smugglers, it is also true of families – a vastly larger subset of the population. Pet. App. 18a.

e) and f) The minivan slowed as it approached the Border Patrol vehicle; the driver appeared to be nervous. As large numbers of innocent drivers take precisely the same actions when encountering law enforcement on the highway, these factors are of hardly any probative value. The District Court itself noted that the nervousness of the driver "doesn't mean [a] whole lot in terms of articulated suspicion." Pet. App. 24a.

g) The fact that Agent Stoddard did not recognize the vehicle. The District Court correctly ascribed little or no value to this factor, noting that "[o]bviously an agent is not going to know all of the vehicles nor all of the visitors that would come into an area." Pet. App. 24a.

h) The fact that the children in the back seats had their knees raised, as if resting on something. The District Court again correctly gave little or no weight to this factor as well. *See* Pet. App. 25a ("Could have been camping equipment, I suppose").

i) The behavior of the children in the back seat. Although the District Court did find "odd" the seemingly mechanical manner in which the children waved to Agent Stoddard, Pet. App. 25a, as the Circuit Court pointed out, there is certainly

nothing unusual about children acting oddly in an automobile. Pet. App. 14a. In any event, even the "odd" waving of children cannot, standing alone or in combination with the others, cause reasonable suspicion of criminal conduct.

j) The vehicle's registration to an address in a neighborhood notorious for smuggling. This, too, has little probative value on its own. To be stopped because one lives in a "bad neighborhood" – essentially a variant of "round up the usual suspects" – is anathema to a free society. Without information about the driver or owner of the car, suspicions about the neighborhood cannot support a seizure. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (fact that appellant was in neighborhood frequented by drug users, without more, not enough to sustain *Terry* stop).

2. Combining The Factors Does Not Make Them More Suspicious.

In its opening brief, the Government contends that even if none of the various factors identified by the District Court are sufficient to justify this stop on their own, reasonable suspicion may nonetheless be found based on the totality of the circumstances. Gov't Br. at 31-35. But this case is unlike any of the others in which the Court has weighed suspicionless factors under the totality of the circumstances test.

First, it is wholly distinguishable from those cases in which the Court used suspicionless factors to "confirm" conclusions that a *Terry* stop was warranted – conclusions that were invariably based on some kind of objectively peculiar conduct by the suspect in question. *See, e.g., Sokolow*, 490 U.S. at 8 (paying for an airplane ticket with cash; traveling under an alias); *Wardlow*, 528 U.S. at 125-26 (unprovoked flight). Here,

the record contains nothing more than a compilation of unremarkable actions by Respondent, actions that are equally consistent with innocent behavior. There is simply nothing "out of the ordinary," *Sokolow*, 490 U.S. at 8, about any of Respondent's actions that the other factors then confirm as suspicious.

Second, there is no extrinsic evidence from other sources that justifies this stop. No informant or tipster alerted Agent Stoddard to probable alien trafficking that day, much less identified Mr. Arvizu as a suspect. And nothing in the record reflects that Agent Stoddard had information derived from previous investigative work that would lead him to target Respondent at that particular location on that particular day.

Finally, this case is a far cry from *Terry* itself. In *Terry*, of course, actions that were each unremarkable on their own nevertheless suggested, in their totality, that criminal conduct was afoot. *Terry*, 392 U.S. at 22-23. But the reasonable suspicion arose from the highly unusual *repetition* of that otherwise unremarkable conduct – 24 trips to look in a store window. Here, there is simply no unusual factor at all – only an aggregation of factors that are each separately, *and together*, equally consistent with innocent conduct. A reasonable person aware of Border Patrol shift changes and the minivan preferences of smugglers who saw Mr. Arvizu drive past in his minivan with his waving children in the midafternoon on a holiday would not immediately – indeed, not ever – reasonably suspect him of criminal conduct. Thus, aggregating the suspicionless factors here yields no more than the sum of the parts. And the sum of various unrelated factors with little or no relevance to reasonable suspicion or to each other is simply little or no relevance. It is not reasonable suspicion.

III. DISAPPROVING THE STOP WOULD SEND A CLEAR MESSAGE TO LAW ENFORCEMENT THAT STRINGING SUSPICIONLESS FACTORS TOGETHER WITHOUT SOME INDEPENDENT INDICIA OF ILLEGALITY DOES NOT CREATE A REASONABLE SUSPICION JUSTIFYING A *TERRY* STOP.

The data presented here, much of which was not available even a few short years ago, puts into stark relief the precarious balance between the Fourth Amendment rights of law-abiding citizens and the reach of vigorous and effective law enforcement. Indeed, it illustrates the vulnerability of our constitutional rights, and the need for constant attendance to them.

It is axiomatic, of course, that each case in this Court is evaluated on its own facts. But "[t]he Fourth Amendment . . . must not be read in a vacuum." *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973). Here, the data showing the larger picture of how law enforcement officers practice their *Terry* obligations is instructive. Innocent people (often poor or otherwise vulnerable) who have been stopped, questioned, and possibly harassed are unlikely to complain about this police conduct to the only logical place – the police department. Further, seeking redress through litigation for the constitutional injury is expensive and difficult. Thus, the only practical control on this conduct may be the courts. "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry,* 392 U.S. at 12. And if the courts give too much deference to "police experience and expertise," *e.g. Ornelas*, 517 U.S. at 699, while relying too lightly on the reasonable person standard of *Terry*, then there

are little controls at all.

This case presents two opportunities for the Court to shape the conduct of law enforcement in *Terry* stops. First, it can make explicit what has been implicit in the cases to date: that absent some independent indicia of illegality, a collection of suspicionless factors may not be strung together to justify a *Terry* stop. Such a rule would reassure a doubting public that law enforcement officers may not violate Fourth Amendment rights with impunity. Equally important, this Court can give clear guidance to law enforcement that sorely needs it. Like the Section Chief of the Border Patrol in El Paso who had not read an injunction binding his agency, the Government appears to believe it is unreasonable to expect police officers to keep up with what the courts say is reasonable suspicion. *See* Gov't Br. at 23-24. But we are not so cynical. In fact, conscientious officers and the superiors who train and supervise them can and do respond to developments in the law – indeed, it is their business to do so. If this Court provides guidance as to what kinds of factors do or do not provide a basis for reasonable suspicion, it can do much to lessen the tensions caused by repeated stops without reasonable suspicion. Though the flexibility inherent in the reasonable suspicion standard is important, so that officers can deal with the wide variety of street encounters they have, so is clear guidance from this Court as to the limits and proper use of that flexibility.

Second, the Court can encourage law enforcement agencies to evaluate what conduct is truly probative of unlawful activity. With the proper impetus from this Court, law enforcement can dramatically improve both their respect for constitutional rights and their effectiveness in enforcing the law. The recent experience of the Customs Service is instructive. Prior to 1999, only three percent of Customs stop and frisks resulted in

arrests. U.S. Gen. Acct. Off., *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results* 2 (March 2000). In addition, the agency was also facing considerable public concern over allegations of racial profiling. *See generally* Montgomery, *supra*. In a systematic review of the bases for their agents' stops, the Customs Service eliminated a list of some 80 factors that had previously been used to justify such searches, including factors such as passengers that were too cooperative, passengers that were too calm, and passengers who were wearing sunglasses or bulky clothing. *Id.* As a result, the number of searches declined by more than 75 percent – while the percentage of arrests flowing from the stops that did occur increased by 300 percent. *Id.*

To be sure, the Court cannot insist on perfection when it comes to investigative stops. *Terry* stops will never be about "hard certainties, but probabilities." *Cortez*, 449 U.S. at 318. No hard and fast rule will ever be able to comprehend "the protean variety of the street encounter." *Terry*, 392 U.S. at 15. But where seizures are repeatedly based on very low probabilities of criminal conduct, resulting in frequent seizures of innocent persons, the level of reasonable suspicion required to justify a stop must be carefully examined and made clear to law enforcement. And where law enforcement can do better, it must. The Court can hardly demand less.

CONCLUSION

Because the Border Patrol stop was not justified by specific and articulable facts supporting an objectively reasonable suspicion that Mr. Arvizu was engaged in criminal conduct, it violated the Fourth Amendment. Accordingly, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PANCHITA HODGERS DURGIN, et al., Plaintiffs, vs. GUSTAVO DE LA VINA, et al., Defendants.	No. CIV 95-029 TUC-JMR MOTION TO RECONSIDER CLASS CERTIFICATION

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MEMORANDUM OF POINTS AND AUTHORITIES

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7. Radio Logs - Tucson Sector

Plaintiffs' contention that agents in the Tucson and Yuma sectors are engaged in a pattern and practice of violating the Fourth Amendment by detaining night time highway travellers and highway travellers of Hispanic, Latino or Mexican appearance without reasonable suspicion is born out by Defendants' radio logs. Plaintiffs believed that - - if the agents were stopping vehicles on less than reasonable suspicion, the radio logs would

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reflect that in the vast majority of the roving patrol stops, agents would uncover no evidence of violations of the immigration and nationality laws or anti-drug statutes. The assumption is correct.

Plaintiffs have obtained, through discovery, the Border Patrol radio logs for the Tucson Sector for the period June 1994 through December 1995. According to Defendant Sanders, Chief Tucson Sector, the radio logs reflect approximately 60% of the agent's radio transmissions in the Tucson Sector (Depo of Sanders, p.134, 11.7-14). The Tucson Sector logs contain transmissions of agents in the Tucson, Casa Grande, Naco, Ajo, Douglas, and Nogales stations. Plaintiffs were provided the "10" codes allowing an analysis of the radio logs to determine when a Border Patrol agent or agents on roving patrol stopped a motorists and if the stop resulted in an arrest or seizure. The radio logs contained the date and time of transmission, the station and location of the agent as well as an identifier for the agent and his/her vehicle and the reason for the transmission. For the purposes of this motion and because of time constraints, Plaintiffs have only reviewed the radio logs for the periods 10/8/94 thru 10/23/94, 1/1/95 thru 1/31/95, 5/25/95 thru 5/31/95, 9/29/95 thru 9/22/95, during which periods the logs reflect that a total of 534 vehicle stops were made by roving patrols. Of these stops, only 14 resulted in arrests, or less than three percent (3%) of the total.[9]

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[9]See Exhibits 44-49, which contain the "10" codes, a summary of the radio logs, and the radio logs for the period surveyed.

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Plaintiffs expect the ratio of 3 to 100 arrests to stops to persist in their review for trial of the radio logs for the remaining period. The radio logs are strong evidence that Border Patrol agents on roving patrol are engaged in a pattern and practice of drawing on prohibited factors in initiating detentions, targeted mainly at individuals of Latin, Hispanic or Mexican appearance. Were Border Patrol agents relying upon "[r]easonable suspicion . . . founded upon a particularized and objective basis for suspecting the **particular person** stopped of criminal activity." *Rodriguez,* 976 F.2d at 595, it would be reasonable to infer that a much greater percentage of stops would yield results.

* * * *